

Selected Federal Compensation Programs for Physical Injury or Death

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Summary

Congress has established a number of programs to compensate or assist victims of certain specific circumstances, including negligence, terrorism, and “acts of God.” Federal compensation programs can be described by certain common attributes. These include aspects of program administration; requirements for and determination of individual eligibility; eligibility of health care providers; types of benefits provided; whether certain diseases are presumed to be eligible for compensation; and the means by which the program is financed.

Though federal compensation programs display considerable diversity in these attributes, most can be classified into one of three categories: (1) programs that primarily limit compensation or assistance to *specified groups of people*, with little or no limitation of the types of injury that may be compensated; (2) programs that primarily limit compensation or assistance for *specified types of injuries*, with little or no limitation of the classes of individuals who may be compensated; and (3) hybrid programs, which limit both the classes of eligible individuals and the compensable injuries or diseases.

This report describes a number of federal programs that Congress established to compensate or assist individuals who have suffered physical or psychological harm as a consequence of specific events (including the actions of others), or who have suffered specific types of physical or psychological harm. First, several program attributes—which are used to describe the specific programs—are discussed in general. Next, selected compensation programs are presented in three groupings, as mentioned above. Next, three veterans’ compensation programs are presented. Veterans’ disability compensation is based on establishing a connection between an illness or injury and military service. Congress has on three occasions granted a presumption of a service-connection for a specific group of veterans. A final section describes four additional federal authorities or assistance programs that do not fit into the above classifications, but that may nonetheless be of interest to policymakers: the Federal Tort Claims Act, Stafford Act emergency and disaster assistance, the Breast and Cervical Cancer Treatment Program, and the World Trade Center Medical Monitoring and Treatment Program (MMTP). The first three of these are prescribed in statute and may provide federal funds to eligible individuals to pay certain health care costs. The MMTP is not explicitly authorized, but has received discretionary appropriations to pay for health care services for eligible individuals. Some Members of Congress have sought to establish explicit authority for the MMTP.

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Introduction

In many instances, people who suffer physical or psychological injury, disease or death due to the actions of others may gain compensation through civil actions in the courts. In addition, Congress has established a number of programs to compensate or assist victims of certain specific circumstances, including negligence, terrorism, and “acts of God.” The programs fall, broadly, into three categories: (1) those that primarily limit compensation or assistance to *specified groups of people*, with little or no limitation on the types of injury that may be compensated (e.g., workers’ compensation systems); (2) those that primarily limit compensation or assistance for *specified types of injuries*, with little or no limitation of the classes of individuals who may be compensated (e.g., the Vaccine Injury Compensation Program); and (3) hybrid programs, which limit both the classes of eligible individuals, and the compensable injuries or diseases (e.g., the Black Lung Program).

These compensation programs display considerable diversity in program design and implementation. In the context of considering compensation for asbestos exposure, the Government Accountability Office (GAO) reviewed four federal programs designed to compensate individuals injured by exposure to harmful substances. GAO found that design of the programs, the agencies that administer them, their financing mechanisms, benefits paid, and eligibility criteria, including their standards of proof (the evidence claimants must provide to support their claims), differed significantly.¹

To assure responsible stewardship of available funds, a variety of approaches are used to determine whether conditions stated in claims are actually related to the relevant employment or incident, and should, therefore, be compensated. This matter is more easily resolved in the case of acute injuries, such as a broken leg sustained from a fall, than it is for illnesses that emerge some time following an exposure (often termed a *latent period*). Some programs, such as those for workers’ compensation, evaluate claims administratively on a case-by-case basis, offering claimants the opportunity to appeal denied claims. Other programs, particularly those dealing with ionizing radiation or other hazardous exposures that may cause a number of different health conditions, develop lists (often called tables) of compensable conditions. It is presumed that when an eligible individual develops a listed condition, the condition is related to the exposure, and compensation is provided. This is called a *disease presumption*.

Vaccine injury compensation programs incorporate both an injury table and a time window following vaccination. Listed conditions that arise within the time window are presumed to be causally related to vaccination, and are compensated. Time limitations may not be applicable in many other circumstances, either because exposures did not occur at discrete or known times, or because some conditions (e.g., some cancers) may arise decades after exposure, but still be causally related to an exposure. When a program does not stipulate time limitations, there is nonetheless often the requirement that a claimant provide evidence that the onset of the condition did not precede the relevant exposure or incident.

Burdens to demonstrate or refute the eligibility of individuals, or causality for health conditions, vary among programs. Disease presumptions help shift the burden of proof from the claimant to the program administrator, in what is an intrinsically adversarial system. Disease presumptions ideally flow from scientific evidence showing a causal relationship between an exposure and a

¹ Government Accountability Office (GAO), “Federal Compensation Programs: Perspectives on Four Programs,” GAO-06-230, November 2005. GAO evaluated the Black Lung Program, the Vaccine Injury Compensation Program (VICP), the Radiation Exposure Compensation Program (RECP), and the Energy Employees Occupational Illness Compensation Program (EEOICP).

subsequent disease. But there is no bright line in medical science beyond which a causal relationship has been demonstrated, and a presumption should be provided. Further, it is not generally possible to know, for a specific individual, whether a condition is causally related to the exposure of interest, or arose for some other reason. Rather, when evidence suggests that exposed populations face an increased risk of developing certain conditions, the presumption of causality may be extended to all individuals in that population, in accordance with the compassionate intent that underpins many of these programs.

This report describes a number of federal programs that Congress established to compensate or assist individuals who have suffered physical or psychological harm as a consequence of specific events (including the actions of others), or who have suffered specific types of physical or psychological harm. First, several program attributes—which are used subsequently to describe the specific programs—are discussed in general. Next, selected compensation programs are presented in three groupings, as mentioned above: (1) programs to compensate specified groups of individuals; (2) programs to compensate for specified types of illness or injury; and (3) hybrid programs. Next, three veterans’ compensation programs are presented. Veterans’ disability compensation is based on establishing a connection between an illness or injury and military service. Congress has on three occasions granted a presumption of a service-connection for a specific group of veterans. A final section describes four additional federal assistance programs that do not fit into the above classifications, but that may nonetheless be of interest to policymakers: the Federal Tort Claims Act, Stafford Act emergency and disaster assistance, the Breast and Cervical Cancer Treatment Program, and the World Trade Center Medical Monitoring and Treatment Program.

Program Attributes

Each of the program descriptions in subsequent sections of this report include discussion of certain program attributes. Following a background discussion of each program, including the basis for congressional action, program attributes that are described include:

Program Administration

This section describes the program’s statutory authority and supporting regulations, if not already mentioned in the background discussion; the agency or agencies responsible for its administration; and relevant topics such as: how payment decisions are made, how denials may be appealed (including whether agency decisions are subject to judicial review), and whether attorney’s fees are covered.

Individual Eligibility

This section describes individuals who are potentially eligible for compensation or assistance, based upon factors such as employment, exposure to a hazard, or the development of a specific disease.

Eligibility or Participation of Health Care Providers

Some of the programs discussed will reimburse individuals or their health care providers for the costs of eligible health care services. Of these programs, some will reimburse any licensed health care provider, unless that provider has been excluded, for cause, from participation. Others restrict, up front, the types of providers that may be reimbursed, in an effort to improve the

quality of services provided, among other factors. Restricting provider eligibility can improve the quality of care by ensuring that providers have experience in treating rare conditions. For example, Congress required, in the Black Lung Program, the establishment of a network of black lung clinics, to provide specialized care in areas where miners typically live. (This program is discussed further in a subsequent section of this report.) Some state workers' compensation programs also establish *specialized provider networks*, staffed by occupational medicine physicians and other specialists. A recent study found that use of a specialized provider network by the Louisiana workers' compensation system reduced lost work time, and was less costly, compared with traditional case management.²

Provider restrictions may also improve program accountability, when eligible providers are trained, for the purposes of the program, to accurately identify eligible disease conditions, and exclude other conditions from coverage. Specialized provider networks can serve as centers for clinical research, and sources of outreach and training to general practitioners, who may see these conditions very rarely. Requiring the exclusive use of selected or in-network providers could limit access to care, though, if providers are not geographically well-placed with respect to the individuals they serve.

Benefits

This section describes the benefits (typically cash) that eligible individuals may receive. These include one or more of the following: (1) a benefit for death or disability; (2) replacement of lost income; and (3) payment or reimbursement of health care costs. Compensation may be provided as one-time or lump-sum payments, as payment or reimbursement for needs as they accrue, or a combination of mechanisms. For most of the programs described in this report, compensation for health care costs, if provided, is limited to those health conditions that are related to the employment or incident being addressed. These programs do not, therefore, constitute general health insurance.

In some cases, the program serves as a *secondary payer*, and any comparable benefits paid by third parties are deducted from the program benefit. The program may also be considered as a third party payer by other benefits programs, which may reduce their payments accordingly, unless the primary program's benefits are protected from recoupment by statute. Benefits also vary in terms of whether they are considered as taxable income, and whether they are considered in determining eligibility for public benefit programs such as Medicaid and Food Stamps.

Disease Presumptions

For those programs with lists (or "tables") of presumed diseases, this section discusses the presumptive conditions, and the approach or approaches used to develop the list. Lists may be developed through a variety of mechanisms. Lists may be provided in statute (e.g., some radiation exposure programs). They may be developed through rulemaking (e.g., the vaccine injury compensation programs). Scientific advisory groups may be tasked with identifying diseases for possible inclusion in a presumptive list (e.g., veterans' compensation following exposure to Agent Orange).

Disease presumptions may be rebuttable. For example, many state workers' compensation laws provide rebuttable presumptions that lung cancer in firefighters who don't smoke be considered occupationally related. Program administrators could rebut the presumption—saying that other

² Edward J. Bernacki et al., "A Preliminary Investigation of the Effects of a Provider Network on Costs and Lost-Time in Workers' Compensation," *Journal of Occupational & Environmental Medicine*, vol. 47(1), pp. 3-10, January 2005.

behaviors on an individual's part, or other factors, were more likely to have caused the cancer—and deny the claim.

Financing

The section describes the mechanism(s) by which the program is financed. Examples include annual appropriations, special appropriations, and payroll and excise taxes.

In an evaluation of four federal compensation programs,³ GAO found that

[s]ince the inception of the programs, the federal government's role has increased and all four programs have been expanded to provide eligibility to additional categories of claimants, cover more medical conditions, or provide additional benefits. As the federal role for these four programs has grown and eligibility has expanded, so have the costs.... Finally, the number of claims filed for three of the programs significantly exceeded the initial estimates, and the structure of the programs affected the length of time it took to finalize claims and compensate eligible claimants.⁴

Programs for Specified Classes of Individuals

Workers' Compensation Systems⁵

Background

Workers' compensation systems have been established in every state in accordance with state laws. Together, these cover the vast majority of private sector workers in the United States. Longshore and harbor workers are covered by a special federal law.⁶ U.S. government employees are covered by the Federal Employees' Compensation Act (FECA).⁷ These compensation systems vary in particulars, but are characterized in general by the following principles. When employees suffer injuries on the job, their employers are obligated to pay the cost of their medical care and (partial) replacement of wages during the period of disability. The system is administrative rather than court-oriented, as fault need not be determined. In view of the relatively prompt and guaranteed benefits, workers do not have standing to sue their employers for injuries, except in very special circumstances.

Program Administration

Employees apply for benefits through their employers or the employer's insurer. The Federal Employees Compensation Program and the Longshore and Harbor Workers' Compensation Program are administered by the Department of Labor, Employment Standards Administration,

³ The Black Lung Program, the Vaccine Injury Compensation Program, the Radiation Exposure Compensation Program, and the Energy Employees Occupational Illness Compensation Program.

⁴ GAO, "Federal Compensation Programs: Perspectives on Four Programs for Individuals Injured by Exposure to Harmful Substances," GAO-08-628T, p. 2, April 1, 2008.

⁵ This section was written by Scott Szymendera, Domestic Social Policy Division.

⁶ The Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§ 901 *et seq.*). Railroad and maritime (high seas) workers can make use of special federal laws, but these are court-oriented liability laws rather than true workers' compensation schemes.

⁷ 5 U.S.C. Chapter 81.

Office of Workers' Compensation Programs. These federal programs, and state governments, have appeal systems available in cases of disputes.

Individual Eligibility

The vast majority of employees in the United States are covered by workers' compensation. Benefits become available in cases of (in typical statutory language) "personal injury or death by accident arising out of and in the course of employment."

Eligibility or Participation of Health Care Providers

Regulations for the Federal Employees Compensation program define physicians, hospitals and other providers as any such parties currently licensed under state law, and provide procedures for exclusion of providers under certain circumstances. "Qualified" providers are those that have not been excluded under these procedures. Grounds for exclusion include certain criminal conduct, exclusion from participation in other federal or state programs, fraud, and certain billing irregularities.⁸ Most states give the employee the choice of physician, at least in the first instance.

Benefits

Medical costs are fully covered. Wage replacement for total disability (whether temporary or permanent) is most often at a rate of two-thirds of the employee's wage, but limited to a maximum percent of the state's average wage for all workers. Benefits in many states are subject to offset for Social Security or unemployment insurance. Permanent partial disability may be compensated according to "percentage" of disability and may be limited by time or cumulative dollar amount. Some specific types of injuries, especially loss of certain body parts or functions, are compensated by a set schedule of dollar amounts or weeks-equivalent of wages.

Disease Presumptions

Not applicable. In principle, occupational diseases are covered as well as occupational injuries. In practice, though, disease claims are much more difficult to sustain. The difficulty arises most often because it is usually hard to prove that a disease was caused by a particular employment. Also, long-latency diseases may be manifested after the period allowed for filing claims has ended. In many states, moreover, explicit restrictions are placed on benefits for specific diseases, especially of the respiratory type. These may require a certain minimum exposure to the hazard, or a maximum period between exposure and disability, or they may require that there be total disability.

Financing

In 2004, benefits nationwide totaled \$54.7 billion, of which \$28.2 billion was wage replacement and \$26.5 billion was for medical care. Employer costs (which include insurance premiums and administration) were \$87.6 billion. This was the equivalent of \$1.58 for each \$100 of covered payroll.⁹ Larger employers tend to "self-insure" (i.e., pay benefits directly out of their own resources) while smaller employers meet their obligations through insurance. In most states, insurance is provided by private carriers or state funds that compete with private carriers. In four

⁸ 20 C.F.R. §§ 10.815 *et seq.*

⁹ Ishita Sengupta, Virginia Reno, and John F. Burton, Jr., *Workers' Compensation: Benefits, Coverage, and Costs, 2006*, National Academy of Social Insurance, Washington, DC, 2008, p. 2.

states, employers must purchase insurance from an exclusive state fund. Longshore and harbor worker insurance is provided by private carriers or self-insurance while responsible federal agencies pay the entire costs of workers' compensation benefits for their employees.

Additional Note

Various rehabilitation and training benefits must be made available under certain circumstances. Employees may be subject to loss of part or all of their wage replacement if they do not cooperate with the rehabilitation program.

Public Safety Officers' Benefits Program

Background

The Public Safety Officers' Benefits Act (P.L. 94-430) established the Public Safety Officers' Benefits (PSOB) program to provide one-time compensation for line-of-duty death or permanent and total disability.¹⁰ The program also provides financial assistance for higher education, and certain additional support services, for the spouses and children of eligible public safety officers.

Program Administration

The PSOB program is administered by the Bureau of Justice Assistance ("the Bureau") in the Department of Justice. Claims are managed administratively. The Bureau is authorized to use appropriated funds to conduct appeals of public safety officers' death and disability claims. This includes capped reimbursement of claimants' attorneys' fees, for those claimants who obtain these services during the initial claims and/or appeals processes.

Individual Eligibility

The Public Safety Officers' Benefits Act initially covered state and local law enforcement officers and firefighters. Subsequently, Congress added federal law enforcement officers and firefighters; members of federal, state, and local public rescue squads and ambulance crews; Federal Emergency Management Agency (FEMA) personnel; state, local and tribal emergency management and civil defense agency employees; and chaplains serving public agencies in an official capacity. Current law provides that law enforcement officers, firefighters, members of rescue squads or ambulance crews, and chaplains are eligible if "serving a public agency in an official capacity, *with or without compensation*."¹¹ (Emphasis added.)

Eligibility or Participation of Health Care Providers

Not applicable. The program does not provide a health care benefit.

Benefits

The PSOB program provides *death benefits* in the form of a one-time financial payment to the eligible survivors of public safety officers whose deaths are the direct and proximate result of a

¹⁰ 42 U.S.C. §§ 3796 et seq. For more information, see CRS Report RL34413, *Public Safety Officers' Benefits (PSOB) Program*, by Nathan James, and Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, "Public Safety Officers Benefits Program," at http://www.ojp.usdoj.gov/BJA/grant/psob/psob_main.html.

¹¹ 42 U.S.C. § 3796b.

traumatic injury sustained in the line of duty, and provides *disability benefits* for public safety officers who have been permanently and totally disabled by a catastrophic personal injury sustained in the line of duty, if that injury permanently prevents the officer from performing any substantial and gainful work. Medical retirement for a line-of-duty disability does not, in and of itself, establish eligibility for benefits. For each death and disability claim, the award amount is solely determined by the actual date of the officer's death or disability.

At its 1976 inception, the PSOB program provided only a death benefit; in 1990, the program added the disability benefit. The act established the payment level at \$50,000 in 1976. It was increased to \$100,000 in November 1988, and to \$250,000 in October 2001, retroactive to January 1, 2001. The amount is pegged to the Consumer Price Index and is adjusted each fiscal year. The current amount of the PSOB benefit is \$315,746 for eligible deaths occurring after October 1, 2008, and for eligible disabilities occurring on or after November 29, 2007. The act requires the Bureau to expedite payments for line-of-duty deaths or disabilities related to a terrorist attack. Benefits are reduced for individuals receiving certain other death or disability benefits, and certain other benefit programs reduce benefits if PSOB program compensation is received.

Disease Presumptions

The act and program regulations do not limit the types of compensable injuries, but stipulate only the compensable outcomes. The act provides the benefit for individuals who have “died as the direct and proximate result of a personal injury sustained in the line of duty,” or who have become “permanently and totally disabled as the direct result of a catastrophic injury sustained in the line of duty.”¹² The law also provides, though, that an otherwise eligible individual shall be eligible for the death benefit as a result of a fatal heart attack or stroke suffered within 24 hours of “non routine stressful or strenuous physical ... activity” performed while on duty.¹³ (This presumption is not rebuttable.) Otherwise, the program is not designed to compensate public safety officers for chronic diseases, although events associated with progressive disease may be covered if line-of-duty injury (e.g., carbon monoxide poisoning) is a substantial contributing factor in causing a death.

Financing

The program received appropriations of \$75 million in FY2008, including \$3 million for its administration. The death benefits (about 88% of the total) are classified as a mandatory expenditure, and the disability and educational benefits as discretionary. A Commerce, Justice, and Science appropriations bill was not completed before the beginning of FY2009. Instead, a continuing resolution (P.L. 110-329, Division A) was enacted in September 2008 to fund the government until March 6, 2009, or until a separate appropriations bill is enacted. The continuing resolution generally funds agencies at their FY2008 levels.

¹² 42 U.S.C. § 3796.

¹³ Ibid.

September 11th Victim Compensation Fund¹⁴

Background

The September 11th Victim Compensation Fund of 2001 (P.L. 107-42) was signed into law on September 22, 2001, establishing a program to compensate any individual (or the personal representative of a deceased individual) who was physically injured or killed as a result of the terrorist attacks. A victim (or personal representative) could seek no-fault compensation from the program, or could bring a tort action against an airline or other party, but could not do both (unless naming a terrorist as the other party).

Program Administration

On November 26, 2001, Attorney General Ashcroft appointed Kenneth R. Feinberg as special master to distribute the fund that Congress created without any financial cap. The Special Master developed and promulgated regulations governing the administration of the fund.¹⁵ The deadline for filing a claim was December 22, 2003.

Individual Eligibility

Eligible claimants included individuals present at the World Trade Center, Pentagon, or Shanksville, Pennsylvania site at the time or in the immediate aftermath of the crashes and who suffered physical harm, as the direct result of the terrorist-related aircraft crashes.¹⁶ A *personal representative*, in general, was an individual appointed by a court of competent jurisdiction as the personal representative of the decedent or as the executor or administrator of the decedent's will or estate.¹⁷ If no personal representative was appointed by a court, the Special Master was authorized to determine who would be the personal representative for purposes of compensation under the Fund.

Eligibility or Participation of Health Care Providers

Not applicable. The program did not provide a health care benefit.

Benefits

Of the 2,973 eligible families of dead victims, 2,880 filed claims.¹⁸ The average award for families of victims killed in the attacks exceeded \$2 million. In addition, 2,682 valid injury claims were filed and processed. The average award for injured victims was nearly \$400,000. The

¹⁴ This section was written by Celinda Franco, Domestic Social Policy Division. See CRS Report RL31716, *Homeland Security: 9/11 Victim Relief Funds*, by Celinda Franco; and CRS Report RL31179, *The September 11th Victim Compensation Fund of 2001*, by Henry Cohen.

¹⁵ 67 *Federal Register* 11233-11247, March 13, 2002, (28 C.F.R. § 104).

¹⁶ 28 C.F.R. §104.2.

¹⁷ 28 C.F.R. §104.4.

¹⁸ Seventy people chose to file law suits naming airlines and government agencies and thereby rejected the federal government's offer of compensation. Twenty-three eligible families of dead victims took no action. These families are no longer eligible to receive compensation from the fund.

overall payout of the program was over \$7.1 billion.¹⁹ Determinations were final and were not subject to judicial review.

The fund issued awards for personal injury claims that were quite diverse, reflecting the varied nature of the injuries sustained, the length of recovery from such injuries, the existence or lack of existence of a disability or incapacity, the long-term prognosis, and the ongoing pain and suffering or lack thereof for each victim. Awards ranged from a low of \$500 to a high of over \$8.6 million after offsets.²⁰

Congress mandated that awards be offset by life insurance and other collateral source compensation. In the regulations the Special Master defined “collateral sources” as not including tax benefits received from the federal government as a result of the Victims of Terrorism Tax Relief Act. He also determined that the amount of offsets for pension funds, life insurance, and similar collateral sources be reduced by amounts of self-contributions made, or premiums paid by, the victim.

Disease Presumptions

The program provided compensation for physical injury or death, from any cause, that resulted from an individual’s presence at the sites at the time of the crashes or in their immediate aftermath. For all claimants other than rescue workers, the *immediate aftermath*²¹ was defined as the period of time that included 12 hours after the time of the crashes. For rescue workers, the *immediate aftermath* included the 96-hour period after the crashes. *Physical harm*²² was defined as a physical injury to the body treated by a medical professional within 24 hours of the sustaining the injury, or within 24 hours of rescue, or within 72 hours of injury or rescue for victims who were unable to realize immediately the extent of their injuries or whose treatment by a medical professional was not available on September 11, or within a time period determined by the Special Master for rescue personnel who did not or could not obtain treatment by a medical professional within 72 hours. The program was not intended to provide compensation for illnesses or injuries that manifested after the stipulated time periods.

Financing

The overall payout of the program was more than \$7 billion. Funding for the program was authorized under the 2001 Emergency Supplemental Appropriations Act for Recovery From and Response to Terrorist Attacks on the United States (P.L. 107-38). The law provided that not less than \$20 billion be available for disaster recovery activities and assistance related to the terrorist acts in New York, Virginia, and Pennsylvania.

¹⁹ U.S. Department of Justice, *Final Report of the Special Master for the September 11th Victim Compensation Fund of 2001*, vol. 1, p. 1.

²⁰ Department of Justice, September 11th Victim Compensation Fund of 2001: Compensation for Personal Injury Victims, Award Payment Statistics, as of January 28, 2005, at http://www.usdoj.gov/archive/victimcompensation/payments_injury.html; and Compensation for Deceased Victims, Award Payment Statistics, as of January 28, 2005, at http://www.usdoj.gov/archive/victimcompensation/payments_deceased.html.

²¹ 28 C.F.R. §104.2(b).

²² 28 C.F.R. §104.2(c).

Additional Note

Several bills were introduced in the 110th Congress to amend the September 11th Victim Compensation program to provide benefits for emergency responders, other workers, and individuals who participated in the rescue, recovery, and clean-up of the airplane crash sites that resulted from the terrorist attacks, and to extend the eligibility dates for filing a claim for compensation for individuals (or representatives of the deceased) who had suffered physical injury or death as the result of debris removal at one of the sites.²³ None of these bills was enacted. Similar legislation has been introduced in the 111th Congress (H.R. 847) and has been the subject of hearings in subcommittees of the House Committees on the Judiciary, and on Energy and Commerce.

Programs for Specified Illnesses or Injuries

National Vaccine Injury Compensation Program²⁴

Background

The National Childhood Vaccine Injury Act of 1986, as amended, provides compensation to persons who suffer injury or death from specified vaccines. It establishes a National Vaccine Injury Compensation Program (VICP) to provide prompt, no-fault, but limited, recovery.²⁵ Claimants who are denied an award under the program, or are dissatisfied with an award, may sue vaccine manufacturers and administrators under state tort law, as modified by the federal statute.²⁶ Persons injured by a vaccine administered after October 1, 1988, with claims of more than \$1,000, may not sue a vaccine administrator or manufacturer without first applying for compensation under the program.

Program Administration

The program is jointly administered by the Department of Health and Human Services (HHS), the Department of Justice (DOJ), and the United States Court of Federal Claims. Claims for compensation under the program are served on the Secretary of HHS and filed in the United States Court of Federal Claims. HHS (through HRSA, the Health Resources and Services Administration) reviews the medical information in the claim, and this review is sent to DOJ, which represents the Secretary of HHS. DOJ reviews the legal aspects of the claim.

Individual Eligibility

Any person who alleges injury as a result of the administration of a covered vaccine (a vaccine listed in the program's Vaccine Injury Table) may file a petition for compensation under the program. (An eligible representative may file on behalf of an injured child or a person who has died.) For a person to be eligible to file a claim, the effects of the person's injury must have: lasted

²³ H.R. 1638, H.R. 3543, H.R. 6594, and H.R. 7174.

²⁴ This section was written by Henry Cohen, American Law Division, and Pamela W. Smith, Domestic Social Policy Division.

²⁵ See Health Resources and Services Administration (HRSA), National Vaccine Injury Compensation Program (VICP), at <http://www.hrsa.gov/vaccinecompensation/>.

²⁶ 42 U.S.C. §§ 300aa-1 *et seq.*

for more than six months after the vaccine was given; or resulted in a hospital stay and surgery; or resulted in death.

Eligibility or Participation of Health Care Providers

No restrictions.

Benefits

Compensation under the program is limited to (1) actual non-reimbursable and reasonable projected non-reimbursable expenses for medical and custodial care and rehabilitation, and related expenses; (2) in the event of a vaccine-related death, \$250,000 for the estate of the deceased; (3) actual and anticipated loss of earnings; (4) up to \$250,000 for actual and projected pain and suffering and emotional distress; and (5) reasonable attorney's fees and other costs. VICP is a secondary payer. Compensation is not made for payments that are or may be available from insurance, a state compensation program, or a federal or state health benefits program, excluding the Medicaid program.

Disease Presumptions

The Vaccine Injury Table provides a presumption of causation for specific injuries or conditions that occur within specified time frames after vaccine administration. An initial Vaccine Injury Table was established in statute, and has been modified by the Secretary of HHS through rulemaking numerous times. Individuals may petition the Secretary to amend the table. Currently, 16 types of vaccines are covered by the program. The table lists specified compensable adverse events and specified time frames for eight different types of vaccines.²⁷ Eight other types of vaccines have been added to the list without specified compensable conditions or time frames. Four of these were listed directly, and another four were added in a separate category for “[a]ny new vaccine recommended by the Centers for Disease Control and Prevention [CDC] for routine administration to children, after publication by [the Secretary of HHS] of a notice of coverage.”²⁸ Compensable adverse events typically include anaphylaxis or anaphylactic shock, infections caused by certain live-virus vaccines, any acute complications (including death) that result from these events, and a number of conditions that are specific to certain vaccines. To qualify for compensation, a petitioner must either demonstrate that a “Table Injury” occurred, or must prove that the vaccine caused the condition or significantly aggravated a pre-existing condition. Compensation is not awarded, however, if the court determines that the injury or death was due to a cause unrelated to the vaccine, even if it was a Table Injury.

²⁷ HRSA, Vaccine Injury Table, at [<http://www.hrsa.gov/vaccinecompensation/table.htm>]. Vaccines for which compensable conditions have been established are: tetanus toxoid-containing vaccines; pertussis antigen-containing vaccines; measles, mumps and rubella virus-containing vaccines in any combination; rubella virus-containing vaccines; measles virus-containing vaccines; polio live virus-containing vaccines; polio inactivated virus-containing vaccines; and hepatitis B antigen-containing vaccines. A ninth category, vaccines containing live, oral, rhesus-based rotavirus, was removed from the table as of November 10, 2008. (See 73 *Federal Register* 59528-59530, October 9, 2008).

²⁸ Vaccines that were specifically listed are *Hemophilus influenzae* (type b polysaccharide conjugate vaccines), varicella vaccine, rotavirus vaccine, and pneumococcal conjugate vaccines. Vaccines added in the CDC-recommended category are hepatitis A, trivalent influenza, meningococcal (conjugate and polysaccharide), and human papillomavirus (HPV).

Financing

Compensation under the program is paid from the Vaccine Injury Compensation Trust Fund, which is funded by a manufacturers' excise tax on certain vaccines. In FY2008, \$61 million in claims and administrative expenses were paid, \$358 million in deposits were received (\$251 million from excise taxes and \$107 million from interest on investments), and the trust fund ended the year with a balance of \$2.91 billion.²⁹

Smallpox Vaccine Injury Compensation Program

Background

In January 2003, the Secretary of Health and Human Services (HHS) declared that the potential for a bioterrorist incident made it advisable to administer, on a voluntary basis, smallpox vaccine and related countermeasures to certain civilians—such as health care workers and public safety officers—who may be called upon to respond in the event of a smallpox attack.³⁰ Vaccinations were administered through programs established by state and territorial health departments.³¹ At that time, liability protections were already in place for parties who manufacture and who would be involved in distribution and administration of smallpox countermeasures, but there was not yet a mechanism to compensate individuals who may be harmed by the covered products. Based on historical information, 1% of those who receive the smallpox vaccine may suffer non-life-threatening adverse reactions, and one or two people per million may die as a result of vaccine-related adverse reactions.³² In April 2003, Congress passed the Smallpox Emergency Personnel Protection Act of 2003 (SEPPA, P.L. 108-20), requiring the federal government, through the Secretary of HHS, to establish a program to provide to eligible individuals or their survivors, for covered injuries, payment for related medical care, lost employment income, and death benefits.³³ The program covers injuries that the Secretary finds to be vaccine-related, occurring in individuals who volunteered for vaccination, or those who were infected after contact with those individuals (so-called “vaccinia contacts”).

Program Administration

The Smallpox Vaccine Injury Compensation Program is administered by HRSA.³⁴ The program borrows certain elements from the PSOB program, including the amount of the death benefit, and the categorization and prioritization of survivors. The law does not permit judicial review of the Secretary's actions.

²⁹ See the Department of Treasury, Vaccine Injury Compensation Reports, at <http://www.treasurydirect.gov/govt/reports/tfmp/vaccomp/vaccomp.htm>.

³⁰ 68 *Federal Register* 4212-4213, January 28, 2003. The declaration was extended several times, and expired on January 23, 2008. 72 *Federal Register* 4013-4014, January 29, 2007.

³¹ CDC, “Smallpox Resources for Health Officials,” <http://www.bt.cdc.gov/agent/smallpox/healthofficials.asp>. CDC also provides smallpox vaccination on an ongoing basis to scientists who study smallpox. The Department of Defense also administers a smallpox vaccination program, <http://www.smallpox.mil/>.

³² Centers for Disease Control and Prevention, smallpox information, <http://www.bt.cdc.gov/agent/smallpox/>.

³³ See CRS Report RL31960, *Smallpox Vaccine Injury Compensation*, by Susan Thaul.

³⁴ See HRSA, Smallpox Vaccine Injury Compensation Program information, at <http://www.hrsa.gov/smallpoxinjury/>. Program regulations are at 42 C.F.R. Part 102.

Individual Eligibility

Eligible individuals are: (1) those who were vaccinated in the context of a covered occupation (including health care workers, law enforcement officers, public safety personnel, and supporting personnel), who received a smallpox vaccine as a participant in an approved smallpox emergency response plan, and who sustained a compensable injury (described below); (2) certain vaccinia contacts, namely, those individuals who are infected as a result of contact with individuals described in (1); and, (3) certain survivors and representatives of the estates of deceased individuals described in (1) and (2).³⁵

Eligibility or Participation of Health Care Providers

No restrictions.

Benefits

The benefits available under the program include compensation for medical care, lost employment income, and survivor death benefits. Benefits are generally not taxable. There are no deductibles, caps or cost-sharing requirements for medical benefits. However, the Secretary may limit the payment of such benefits to the amounts he considers reasonable for those services and items he considers reasonable and necessary. Benefits payments shall “be secondary to any obligation of the United States or any third party (including any State or local governmental entity, private insurance carrier, or employer) under any other provision of law or contractual agreement, to pay for or provide such services or benefits.”³⁶ The program’s regulations (1) require eligible requesters to submit to the Secretary of Health and Human Services (HHS) a list of all possible third-party payers, or certify that there are none; (2) provide that the Secretary will pay medical benefits only to the extent that they have not been and will not be paid by any third-party payer; and (3) reserve the right of the Secretary to recoup medical costs from any third-party payers after the Secretary has made payment to the beneficiary.³⁷ These payers include, but are not limited to, insurance companies, workers compensation programs, the Federal Employees Compensation Program, and the PSOB program.

The death benefit is in the amount specified by the PSOB program. (The FY2009 benefit amount is \$315,746.) Any death benefit to survivors is reduced by the amount that the smallpox vaccine injury compensation program had paid as lost employment income benefits to the deceased. The death benefit may not be in addition to a PSOB disability or death benefit. It may, however, be made in addition to any payment or reimbursement for medical care made to that person prior to death.

According to the CDC, through December 2003, “approximately 40,000 civilian personnel from 50 states received licensed smallpox vaccine as part of state and local smallpox preparedness programs.... Subsequent to 2003, vaccination of response team members has continued, although in much lower numbers. Unfortunately there is no registry which has current information regarding the number of public health and healthcare volunteers vaccinated within the states.”³⁸

³⁵ Eligibility was restricted to individuals who were vaccinated as part of an approved smallpox response plan, and their contacts. However, since smallpox vaccine is not commercially available, it is likely that most or all of the individuals who received the vaccine would have met this definition.

³⁶ Public Health Service Act §264(b) [42 U.S.C. §239c(b)].

³⁷ 42 C.F.R. § 102.

³⁸ Centers for Disease Control and Prevention, *CDC Interim Guidance for Revaccination of Eligible Persons Who*

Disease Presumptions

Smallpox vaccine recipients are eligible for compensation for 12 covered conditions. Vaccinia contacts are eligible for compensation for 11 of these conditions.³⁹ The onset of each compensable condition must occur within a specified time following vaccination.

Financing

In April 2003, coincident with passage of SEPPA, Congress provided, in the Emergency Wartime Supplemental Appropriations Act, 2003 (P.L. 108-11), \$42 million in no-year funds for the Secretary of HHS to compensate eligible individuals who were injured as a result of smallpox vaccination. Congress has since rescinded \$30 million of that amount.⁴⁰ As of January 2007, HRSA had received 62 claims, and had paid one death claim of \$262,100, 10 medical expense and injury claims totaling \$1,616,000, and five claims for lost employment income totaling \$94,352. Additional claims were pending. The agency also reported spending slightly more than \$2 million in administrative costs, including the costs of identifying third-party payers and establishing annuities.⁴¹

Hybrid Programs

Black Lung Program⁴²

Background

As an alternative to benefits under state workers' compensation programs, which were found to be rarely accessible to coal miners suffering from pneumoconiosis (black lung), the Black Lung Benefits Act provides cash compensation and medical care benefits to black lung victims, and cash payments to their survivors.⁴³

Program Administration

The program is administered by the Office of Workers Compensation Programs in the Department of Labor, not by the Mine Safety and Health Administration (MSHA). Prior to 2003, the Part B benefit (pertaining to the oldest claims) was administered by the Social Security Administration.

Participated in the U.S. Civilian Smallpox Preparedness and Response Program, October 2008, <http://emergency.cdc.gov/agent/smallpox/revaxmemo.asp>.

³⁹ Compensable conditions are: significant local skin reaction; Stevens-Johnson Syndrome; inadvertent inoculation; generalized vaccinia; eczema vaccinatum; progressive vaccinia; postvaccinial encephalopathy, encephalitis or encephalomyelitis; fetal vaccinia; secondary infection; anaphylaxis or anaphylactic shock (vaccinia contacts not covered); vaccinia myocarditis, pericarditis, or myopericarditis; and, death resulting from any of the above injuries when the injury arose within the specified time.

⁴⁰ P.L. 108-447, Section 224 (December 8, 2004), rescinded \$20 million, and P.L. 109-149, Section 220 (December 30, 2005), rescinded an additional \$10 million.

⁴¹ HRSA Office of Legislation, February 26, 2007.

⁴² This section was written by Scott Szymendera, Domestic Social Policy Division.

⁴³ 30 U.S.C. §§ 901-945; 26 U.S.C. §§ 4121 and 9501.

Individual Eligibility

Coal miners totally disabled by black lung disease, and their surviving dependents, are eligible for benefits. A claim must meet three general conditions: (1) the miner must have (or if deceased, must have had) black lung disease; (2) the miner must be totally disabled by the disease; and (3) the disease must have arisen out of coal mine employment. Certain statutory presumptions of eligibility may come into play in establishing qualification for benefits, in addition to medical evaluations. For example, if a miner with pneumoconiosis worked in coal mines for more than 10 years, there is a presumption that the disease arose out of that employment. Claimants who filed through June 1973 (December 1973 in the case of survivors) were judged eligible under Part B program definitions; later claims are determined under somewhat more stringent Part C definitions. Coverage under Part B vs. Part C also differs depending on the date of claimants' last coal mine employment.

Eligibility or Participation of Health Care Providers

There are no restrictions for miners receiving treatment for pneumoconiosis. However, in establishing the diagnosis of pneumoconiosis, an essential element of individual eligibility, providers who submit certain evidence such as chest X-rays may require special certifications (e.g., board certification in radiology.)

Congress created the Black Lung Clinics Program (BLCP) to provide specialized pulmonary and respiratory care to coal miners who otherwise could not access specialized health care.⁴⁴ Eligible individuals are not required to receive care through a Black Lung Clinic. The BLCP is administered by HRSA.⁴⁵

Benefits

Part B and Part C benefits are the same amount. Basic monthly cash compensation is equal to 37.5% of a base GS-2 federal salary, increased to as much as 75% of a GS-2 salary for those with dependents (or if there are multiple survivors). For 2009, the range of rates is from \$616 to \$1,233 per month. Neither the Part B nor Part C benefit is taxable.

The program pays for the full cost of any medical treatment and care of eligible disabled miners related to black lung disease, including reasonable transportation costs. The program provides two types of medical services related to black lung disease: diagnostic testing for all miner-claimants to determine the presence or absence of black lung disease and the degree of associated disability; and, for miners entitled to monthly benefits, medical coverage for treatment of black lung disease and disability. Diagnostic testing includes a chest X-ray, a pulmonary function study (breathing test), an arterial blood gas study, and a physical examination. Medical coverage includes (but is not limited to) costs for prescription drugs, office visits, and hospitalizations. Also provided, with specific approval, are items of durable medical equipment, such as hospital beds, home oxygen, and nebulizers; outpatient pulmonary rehabilitation therapy; and home nursing visits.⁴⁶

Black lung beneficiaries also may receive benefits under state workers' compensation or black lung laws, social security or other disability or retirement systems, or unemployment

⁴⁴ The Black Lung Benefits Reform Act of 1977 (P.L. 95-239), as amended, February 27, 1985, authorized support of the BLCP to evaluate and treat coal miners with respiratory impairments.

⁴⁵ HRSA, Black Lung Clinics Program, <http://ruralhealth.hrsa.gov/funding/BLCP/>.

⁴⁶ Department of Labor, Compliance Guide to the Black Lung Benefits Act, <http://www.dol.gov/esa/owcp/dcmwc/regs/compliance/blbenact.htm>.

compensation programs. Part B benefits are reduced by comparable payments received under workers' compensation, disability insurance, or unemployment compensation laws; they also are subject to a reduction for earnings. Part C benefits are reduced by comparable workers' compensation payments, but not by disability insurance or unemployment compensation payments; a reduction for earnings applies to claims made after 1981, and the receipt of Part C benefits can cause a reduction in social security disability benefits.

Disease Presumptions

Black Lung Program regulations require that certain medical evidence must be established to support a diagnosis of pneumoconiosis. Then, regulations establish certain presumptions in extending eligibility to miners with pneumoconiosis, including a rebuttable presumption that a miner who is suffering or suffered from pneumoconiosis, and who was employed for 10 or more years in one or more coal mines, developed pneumoconiosis as a result of such employment; and an irrebuttable presumption that the death or total disability of a miner with pneumoconiosis is due to pneumoconiosis.⁴⁷

Financing

The costs of the Part B program (cash compensation and related administrative expenses) are financed by federal appropriations from general revenues. Part C costs (cash payments, medical costs, and federal administrative costs) are largely funded by the Black Lung Disability Trust Fund, which in turn is financed by: (1) an excise tax on coal; (2) loans from the federal Treasury, if necessary because coal tax revenues are not sufficient; and (3) small amounts attributable to interest on trust fund investments in government securities, certain fees and penalties collected by the trust fund, and recoupment of some beneficiaries' payments. Some Part C benefits are paid directly by individual coal mine operators who have been identified "responsible" under specified rules.

As the Part C trust fund was inadequate to meet claims in the early years, it borrowed substantially from the Treasury and currently owes \$10 billion. In recent years, coal tax receipts have been approximately equal to benefit payments, but the fund has had to borrow from the Treasury to meet its interest obligations to the Treasury. Proposals have been made for retiring this debt (e.g., H.R. 3915 in the 109th Congress).

Radiation Exposure Compensation Act (RECA)

Background

The Radiation Exposure Compensation Act (RECA) of 1990 established a trust fund to provide compassionate lump-sum payments to individuals who have contracted certain cancers and other serious diseases that are presumed to be the result of their exposure to ionizing radiation from above-ground nuclear weapons testing or from various activities in connection with uranium mining.⁴⁸ The act was substantially amended in 2000 to expand eligibility (as discussed below) and to require GAO to report on program status every 18 months.⁴⁹

⁴⁷ 20 C.F.R. §§ 718.301 *et seq.*

⁴⁸ P.L. 101-426 (October 15, 1990), 42 U.S.C. § 2210 note.

⁴⁹ The most recent report is GAO, "Radiation Exposure Compensation Act: Program Status," GAO-07-1037R,

Program Administration

The Radiation Exposure Compensation Program (RECP) is administered by the Department of Justice, Civil Division.⁵⁰

Individual Eligibility

As originally enacted, RECA established two categories of claimants: (1) downwinders (i.e., civilians who lived in specified counties in Nevada, Arizona, and Utah downwind from the Nevada Test Site in the 1950s and early 1960s) who developed one of 13 types of cancer; and (2) uranium miners in certain western states who worked in underground mines between 1947 and 1971 and who developed lung cancer or certain nonmalignant respiratory diseases. Immediately after its enactment, RECA was amended to include a third category of claimant: government employees and others who participated on-site in an above-ground test, and who developed one of the same 13 cancers for which downwinders may be compensated.⁵¹ RECA was more substantially modified and expanded in 2000.⁵² The changes included creating two new claimant populations (i.e., uranium mill workers and uranium ore transporters) and adding six types of cancer to the list of cancers for which downwinders and on-site participants may be compensated.

Eligibility or Participation of Health Care Providers

No restrictions; however, RECA authorizes grants for programs to screen potential claimants, provide referrals for treatment, help with claims documentation, and develop public information and education programs about radiogenic diseases. Under this authority, HRSA funds seven health care institutions in five western states (AZ, CO, NV, NM, and UT).⁵³

Benefits

The benefits for each of the RECA claimant categories are as follows: (1) downwinders who have contracted one of the 19 compensable cancers receive a payment of \$50,000; (2) on-site participants who have contracted one of the 19 compensable cancer types receive a payment of \$75,000; (3) uranium miners who meet the exposure criteria or mined for at least a year during the relevant time period, and who have contracted lung cancer or certain nonmalignant respiratory diseases receive a payment of \$100,000; and (4) uranium mill workers and ore transporters who worked during the relevant time period and have contracted lung cancer, certain nonmalignant respiratory diseases, kidney cancer, or certain other chronic kidney diseases receive a payment of \$100,000. These benefits are offset (reduced) by any amounts received under private litigation, and acceptance of the benefits constitutes settlement of all claims against the federal government and its contractors. RECA payments are not subject to federal income tax and are not considered income for the purposes of computing eligibility for state or federal benefit programs.

September 7, 2007.

⁵⁰ For more information, see <http://www.usdoj.gov/civil/torts/const/reca/index.htm>.

⁵¹ P.L. 101-510 (November 5, 1990). On-site participants are individuals who were present above or within the official boundaries of the Nevada, Pacific, Trinity, or South Atlantic Test Sites during a period of testing and who participated in the test.

⁵² P.L. 106-245 (July 10, 2000).

⁵³ See HRSA, Radiation Exposure Screening and Education Program (RESEP), <http://ruralhealth.hrsa.gov/radiationexposure/>.

Since the inception of the program, 30,054 claims have been filed and \$1.4 billion has been awarded for 20,864 claims (as of as of April 23, 2009).

Disease Presumptions

The 19 compensable cancers, which are established in statute, are leukemia (other than chronic lymphocytic leukemia); multiple myeloma; lymphoma (other than Hodgkin's disease); and primary cancer of the thyroid, breast, esophagus, stomach, pharynx, small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary bladder, brain, colon, ovary, liver (except if cirrhosis or hepatitis B is indicated), or lung.⁵⁴

Financing

In the past, Congress made annual appropriations to the RECA trust fund, from which compensation was paid to eligible claimants. Any money remaining in the trust fund at the end of the fiscal year was carried forward to the next fiscal year. Passage of the RECA Amendments of 2000 led to a dramatic increase in the number of claims filed and processed. Congress initially appropriated \$11 million to the trust fund for FY2001, but followed that up with a supplemental appropriation for such sums as may be necessary to pay claims through the end of that fiscal year. The trust fund paid out a total of \$108 million in approved claims in FY2001. The National Defense Authorization Act for FY2002 mandated the appropriation of such sums as may be necessary for the RECA trust fund for a 10-year period—FY2002 through FY2011—up to a specified maximum amount each fiscal year.⁵⁵ The Consolidated Appropriations Act for FY2005 amended that language and made funding for the RECA trust fund mandatory and indefinite beginning in FY2006.⁵⁶ Also, beginning in FY2005, the trust fund only pays downwinder and on-site participant claims. Pursuant to the Ronald W. Reagan National Defense Authorization Act for FY2005, the claims of uranium miners, millers, and ore transporters are paid by the Energy Employees Occupational Illness Compensation Program (described below).⁵⁷ Furthermore, under this program uranium miners, millers, and ore transporters who receive RECA compensation may also be eligible to receive an additional \$50,000 and future medical benefits related to the condition for which they received compensation under RECA.

Energy Employees Occupational Illness Compensation Program Act (EEOICPA)

Background

The Energy Employees Occupational Illness Compensation Program Act (EEOICPA, P.L. 106-398, Title XXXVI, October 30, 2000) provides monetary compensation and medical benefits to eligible workers in the nuclear weapons industry, many of them government contractors.⁵⁸ These workers may have been exposed to ionizing radiation, beryllium, and other hazards, and because

⁵⁴ 42 U.S.C. § 2210 note 4(b)(2).

⁵⁵ P.L. 107-107 (December 28, 2001). The act capped the appropriations for the RECA Trust Fund as follows: FY2002, \$172 million; FY2003, \$143 million; FY2004, \$107 million; FY2005, \$65 million; FY2006, \$47 million; FY2007, \$29 million; FY2008, \$29 million; FY2009, \$23 million; FY2010, \$23 million; FY2011, \$17 million.

⁵⁶ P.L. 108-447 (December 8, 2004).

⁵⁷ P.L. 108-375 (October 28, 2004).

⁵⁸ 42 U.S.C. § 7384 *et seq.*

of the secretive nature of their work, they may not have been properly advised of, or protected from, harmful exposures.

Program Administration

Claims are managed by the Department of Labor (DOL), Office of Workers' Compensation Programs.⁵⁹ The National Institute of Occupational Safety and Health (NIOSH, within the CDC) conducts exposure studies for certain eligible individuals to characterize their occupational radiation exposure using available worker and/or facility monitoring data (discussed further under "Disease Presumptions," below).⁶⁰ The Department of Energy (DOE) provides worker and facility records to support both claims management and exposure assessment, and is required to assure the cooperation of government contractors in furnishing such information.⁶¹

Individual Eligibility

Program benefits are often referred to by the applicable subtitles of the law. *Part B* benefits (i.e., those provided in Subtitle B) are available to DOE employees, contractors, subcontractors, and atomic weapons employers who develop certain radiation-induced cancers after having worked in a covered facility, provided that the cancer is determined to be work-related. (The nature of this determination is discussed later in the section on "Disease Presumptions") *Part B* benefits are also available to DOE employees, contractors, subcontractors, and atomic weapons employers if they develop illnesses related to beryllium or silica exposure after having worked in certain covered facilities, or if they are uranium workers who have been determined to be eligible for benefits under RECA (discussed in an earlier section of this report).

Part E benefits (those provided in Subtitle E) are available to (1) *Part B* recipients (including uranium workers who have been determined to be eligible for benefits under RECA) and (2) nuclear weapons workers who develop any other illness caused by toxic substances at these facilities.⁶² Beginning in 2005, *Part E* replaced a *Part D* program which, rather than paying federal benefits, assisted workers in making claims under state workers' compensation laws.

Eligibility or Participation of Health Care Providers

There are no special restrictions. Providers must register with DOL. Eligible claimants receive a document describing their eligible medical conditions. DOL sets a fee schedule based on geographic location. Balance billing is not permitted. Some services require preauthorization.

Benefits

For most claimants, the *Part B* benefit provides a lump sum of \$150,000, and pays necessary medical expenses. The exception, uranium workers previously awarded benefits under RECA, receive a lump sum of \$50,000, and payment of necessary medical expenses. The *Part E* benefit

⁵⁹ See U.S. Department of Labor, Division of Energy Employees Occupational Illness Compensation, <http://www.dol.gov/esa/owcp/energy/index.htm>.

⁶⁰ See NIOSH, Office of Compensation Analysis and Support (OCAS), <http://www.cdc.gov/niosh/ocas/>, hereafter OCAS website.

⁶¹ See U.S. Department of Energy, Energy Employees Occupational Illness Compensation Program, <http://www.hss.energy.gov/HealthSafety/FWSP/Advocacy/>.

⁶² In 2004, Congress transferred management of *Part E* from DOE to DOL, in Title XXXI of the Ronald W. Reagan National Defense Authorization Act for FY2005, P.L. 108-375.

pays necessary medical expenses, and provides a lump sum payment—capped at \$250,000—based on wage loss and the degree of impairment. Much like a traditional workers' compensation program, EEOICPA is the primary and sole payer for all medical expenses related to covered cancers and other illnesses. The program pays 100% of all covered medical expenses, and program beneficiaries are not responsible for any co-payments, deductibles, or other medical costs. With some restrictions, both Part B and Part E benefits are payable to eligible survivors. The Part E benefit (unlike the B benefit) is subject to offset for any state workers' compensation payments received.⁶³

As of April 23, 2009, more than 177,372 claims had been filed, and more than 50,916 were approved, in Parts B and E. Monetary compensation and medical benefits totaled more than \$4.8 billion.⁶⁴

Disease Presumptions

Diagnostic criteria for beryllium disease (including beryllium sensitivity) and silicosis are explicitly defined in the authorizing statute. Eligibility depends on meeting these criteria and documenting exposure at a covered facility.

Compensable cancers are listed in statute. They are, by reference, the cancers listed in the RECA statute, along with bone and renal cancers.⁶⁵ For workers with cancer who are otherwise eligible (i.e., they worked for a sufficiently long period of time in certain facilities), two different processes are used to establish whether the cancer is work-related. Those who have one of the listed cancers *and* are members of the Special Exposure Cohort (SEC) qualify for the presumption that their cancer is work-related and are eligible for benefits. Workers in the SEC who have a type of cancer that is not listed, and workers who are not in the SEC and have any type of cancer, instead bear the burden to demonstrate that their cancer is work-related through the process of *dose reconstruction*.

EEOICPA designated four specific groups of workers as members of the SEC.⁶⁶ In addition, Section 7384q of the act authorizes the President, with the advice of an advisory board appointed by NIOSH, to include additional classes of workers in the SEC if he determines that “(1) it is not feasible to estimate with sufficient accuracy the radiation dose that the class received; and (2) there is a reasonable likelihood that such radiation dose may have endangered the health of members of the class.” The SEC currently includes more than 30 different groups of workers, including more than 1,000 workers and their survivors.⁶⁷ Membership in the SEC greatly simplifies the process of qualifying for benefits, and the designation of SEC classes has been controversial. For example, there have been allegations of bias or other irregularities in appointing members of the advisory board, issuing contracts, and other matters.⁶⁸ In each

⁶³ Benefits formulas, program statistics, and other information are available at <http://www.dol.gov/esa/owcp/energy/>.

⁶⁴ Some claimants may file under both parts. The above figures reflect claims by a total of 72,177 individual workers.

⁶⁵ 42 U.S.C. § 7384l. Though both RECA and EEOICPA list leukemia among the compensable cancers, the two laws apply slightly different criteria for age and disease onset.

⁶⁶ Certain workers at the gaseous diffusion plants at Paducah, KY; Portsmouth, OH; and Oak Ridge, TN, and at the Alaska underground test site.

⁶⁷ OCAS website, and Larry Elliott, Director, OCAS, NIOSH Science Blog, “NIOSH Dose Reconstruction Program,” January 22, 2008, http://www.cdc.gov/niosh/blog/nsb012208_dose.html.

⁶⁸ See, for example, GAO, “Energy Employees Compensation: GAO’s Prior Work Has Identified Needed Improvements in Various Aspects of the Program,” GAO-07-233T, December 5, 2006.

Congress since the act's passage in 2000, some Members of Congress have introduced bills to grant SEC status to particular groups of workers.

Dose reconstruction is carried out by NIOSH, which uses radiation exposure data (e.g., film badge readings, urine sample data, and medical x-rays) and other information (e.g., health outcomes in co-workers) to estimate a worker's radiation exposure. NIOSH provides this information to DOL and advises DOL regarding a statistical determination of whether a worker's cancer is "at least as likely as not" to be work-related. Though the statistical model is weighted to favor the worker, the process must be initiated by workers (or their survivors) and may be especially challenging and time-consuming when, as often happens, the data needed for analysis are not available. Between October 2001 and April 2009, NIOSH received more than 29,000 claims for dose reconstruction. It has completed 83% of these claims and returned them to DOL for a compensation decision.⁶⁹

Financing

The authorizing statute made a permanent appropriation of such amounts as may be necessary to pay benefits. Administrative costs for Part B require annual appropriation. (These include costs for DOL, DOE, and NIOSH activities.)

Marshall Islands Nuclear Claims Tribunal⁷⁰

Background

From 1946 to 1958, the United States conducted 67 atmospheric atomic and thermonuclear weapons tests on or near the Marshall Islands atolls of Bikini and Enewetak. During that time, the Marshall Islands, located east of Guam in the Southwest Pacific, was a district of the United Nations Trust Territory of the Pacific Islands administered by the United States. The Compact of Free Association, enacted in 1986, terminated the Trust Territory status of the Marshall Islands and Micronesia and provided a "full measure of self-government" for the peoples of the two island countries.⁷¹ Section 177 of the Compact and the Agreement for the Implementation of Section 177 (the "177 Agreement") extended \$150 million in the form of a trust fund (Nuclear Claims Fund) as compensation for the four "most affected" Marshall Islands atolls. According to U.S. government estimates, between 1958 and 2004, the United States spent \$531 million on nuclear test-related compensation and assistance in the Marshall Islands.

In September 2000, the Marshall Islands government submitted to the U.S. Congress a Changed Circumstances Petition, pursuant to the Compact, requesting additional compensation, including funding for personal injury awards.⁷² In November 2004, the U.S. Department of State released a report concluding that there was no legal basis for considering additional compensation payments. The 109th Congress held hearings on the petition in 2005 but made no determination.

⁶⁹ OCAS website, as of April 26, 2009.

⁷⁰ This section was prepared by Thomas Lum, Foreign Affairs, Defense and Trade Division.

⁷¹ The Compact was negotiated and agreed to by the governments of the United States and the Marshall Islands and approved by plebiscite in the Marshall Islands and by the U.S. Congress in 1985 (P.L. 99-239). Portions of the Compact were renewed in 2003 (P.L. 108-188).

⁷² For further information, see CRS Report RL32811, *Republic of the Marshall Islands Changed Circumstances Petition to Congress*, by Thomas Lum et al<CrsProductRef productCode="RL32811" url="http://apps.crs.gov/products/rl/html/RL32811.html" title="Republic of the Marshall Islands Changed Circumstances Petition to Congress" includeAuthors="true" />.

In April 2006, the peoples of Bikini and Enewetak atolls filed lawsuits against the U.S. government in the U.S. Court of Federal Claims seeking additional compensation related to the U.S. nuclear testing program. The court dismissed both lawsuits on August 2, 2007. In August 2008, attorneys for Bikini and Enewetak asked for a reversal of the decision in the U.S. Court of Appeals for the Federal Circuit. The appeals court upheld the lower court ruling on January 30, 2009, finding that Section 177 of the Compact removed U.S. jurisdiction.

Program Administration

The 177 Agreement established a Nuclear Claims Tribunal (NCT) to adjudicate claims related to the nuclear testing program and allocated \$45.75 million from the Nuclear Claims Fund for payment of personal injury and property damages awards. The Tribunal is made up of three judges for terms of three years, and is organized into three operational divisions—Administration, the Office of the Defender of the Fund, and the Office of the Public Advocate—all of which are under the supervision of the Chairman.

Individual Eligibility

The Tribunal's system of personal injury compensation, implemented in 1991, is modeled after the Radiation Exposure Compensation Act (RECA). As with RECA, the Tribunal does not require the claimant to prove a specific causal link between his or her exposure to ionizing radiation and the claimant's injury. The claimant must simply provide proof of residency in the Marshall Islands during the years of nuclear testing (July 1, 1946 to August 19, 1958) and have one of the listed medical conditions (i.e., compensable diseases), which the Tribunal presumes to be caused by radiation exposure.

Eligibility or Participation of Health Care Providers

No restrictions.

Benefits

Unlike RECA, which pays the same amount for all downwinder claims (i.e., \$50,000), the Tribunal awards differing amounts for the various diseases on its list of compensable diseases. Awards range from \$12,500 for certain benign tumors and non-cancerous conditions to \$125,000 for certain types of malignant cancer. For biological children of a mother who was physically present at the time of the testing, the NCT provides 50% of amounts offered to first-generation claimants.

Disease Presumptions

Initially, the Tribunal adopted a list of 25 compensable diseases, including the cancers listed under RECA, and other conditions for which there was credible evidence showing a significant statistical relationship between exposure to ionizing radiation and the subsequent development of the disease. In determining which diseases to include on the list, the Tribunal referred to the findings of the Radiation Effects Research Foundation in Japan and the U.S. National Academy of Sciences, and sought recommendations from Dr. Robert Miller, an expert in the field of radiation health effects. The Tribunal reviewed the list of compensable diseases each year and considered any new scientific evidence on diseases linked to exposure to ionizing radiation. As a

result of that review process, the list has been amended on several occasions since 1991 and now includes a total of 36 medical conditions.⁷³

Financing

The \$150 million Nuclear Claims Fund was intended to generate a perpetual source of income for personal injury and property damages claims, as well as health care, medical surveillance and radiological monitoring, trust funds for the four atolls, and quarterly distributions to the peoples of the four atolls for hardships suffered. However, the Fund reportedly ceased making payments in 2006 due to depletion of funds. The Nuclear Claims Tribunal's personal injury awards alone have far exceeded the \$45.75 million allocated by the Compact to the Tribunal for both personal injury and property damages compensation. As of December 2006, the NCT had awarded \$91.4 million for compensable injuries to approximately 2,000 individuals, of which only about 80% had been paid out because of the lack of funds.

Ricky Ray Hemophilia Relief Fund Program

Background

The Ricky Ray Hemophilia Relief Fund Act of 1998 established a five-year trust fund to provide compassionate lump-sum payments to hemophiliacs who became infected with the human immunodeficiency virus (HIV) during the early 1980s as a result of using HIV-infected antihemophilic (blood clotting) factor.⁷⁴ The act authorized appropriations to the trust fund totaling \$750 million.

Program Administration

The Ricky Ray Hemophilia Relief Fund program was administered by HRSA. Pursuant to the act, the trust fund terminated on November 12, 2003. The administrative close-out of the program occurred on October 31, 2005.

Individual Eligibility

The Ricky Ray program covered individuals with blood-clotting disorders, such as hemophilia, who used blood clotting factor between July 1, 1982, and December 31, 1987, and contracted HIV, as well as certain persons who contracted HIV from these individuals. In the event individuals eligible for payment were deceased, the program also provided payments to certain survivors of these individuals. In addition to hemophiliacs who contracted HIV from their treatments, their spouses and children are also eligible if infected.

Eligibility or Participation of Health Care Providers

Not applicable. The program did not provide a health care benefit.

⁷³ See Nuclear Claims Tribunal at <http://www.nuclearclaimstribunal.com/>.

⁷⁴ P.L. 105-369 (November 12, 1998), 42 U.S.C. §§ 300c-22 note.

Benefits

The act provided for a payment of \$100,000 to each eligible claimant. Some petitions resulted in a payment of less than \$100,000. In all, the Ricky Ray program paid out more than \$559 million to almost 7,200 eligible individuals and survivors. Ricky Ray payments were not subject to federal income tax and did not affect eligibility for Medicaid or other federal benefits, nor were they subject to recoupment by insurers.⁷⁵

Disease Presumptions

The act provided that any eligible individual (i.e., an individual who had a blood clotting disorder, who used clotting factors within the specified time period, and who had an HIV infection) would receive compensation. Eligible individuals were not required to offer evidence that HIV infection was caused by their use of clotting factors.

Financing

In three separate appropriations, the trust fund received a total of \$655 million, which was more than sufficient to pay all the eligible claims.⁷⁶ All remaining funds were returned to the U.S. Treasury.

Veterans' Disability Compensation⁷⁷

Background

The Department of Veterans Affairs (VA) pays monthly cash benefits to veterans who are physically or mentally disabled by injury or disease as a result of military service. These disabilities need not have occurred in the line of duty, or even be related to active duty. For a condition to be regarded as service connected—and, therefore, eligible for compensation—veterans need show only that the condition occurred (or was aggravated) as a result of military service, or arose during that period. The severity of a veteran's disability is evaluated by the VA, which assigns a disability rating, in increments of 10%, from 0% to 100%. In order to receive disability compensation, a veteran must be rated at least 10% disabled. The rate of compensation depends on the degree of disability and follows a payment schedule that is adjusted annually and applies to all veterans.⁷⁸ Veterans are required to document that their condition is related to their service. The claim is often clearly documented by pertinent military records. However, with some medical conditions, evidence of a service connection is inconclusive.

⁷⁵ The act also specified that payments arising from the successful class action lawsuit brought by the hemophilia community against the manufacturers of blood clotting factor were not to affect eligibility for Medicaid or Supplemental Security Income.

⁷⁶ The Ricky Ray fund initially received \$75 million in the FY2000 Labor-HHS-Education appropriations bill (P.L. 106-113). The FY2001 omnibus consolidated appropriations bill (P.L. 106-554) included \$105 million for the fund. P.L. 106-554 incorporated the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000, which provided an additional appropriation of \$475 million for Ricky Ray. All funds were to remain available until expended.

⁷⁷ Assistance with this section was provided by Sidath Viranga Panangala, Domestic Social Policy Division.

⁷⁸ See CRS Report RL33991, *Disability Evaluation of Military Servicemembers*, by Christine Scott et al., and CRS Report RL33113, *Veterans Affairs: Basic Eligibility for Disability Benefit Programs*, by Douglas Reid Weimer.

The Secretary of Veterans Affairs has statutory authority to grant a presumption of a service connection for specific conditions and/or specific groups of veterans, making veterans potentially eligible for disability compensation in the absence of conclusive evidence linking their medical conditions to military service.⁷⁹ This authority was used most recently to establish a presumption of a service connection for amyotrophic lateral sclerosis (ALS, commonly called “Lou Gehrig’s disease”) for any veteran who, after at least 90 continuous active days of service in the military, develops the disease at any time after separation from service.⁸⁰

Since 1988, Congress has on three occasions granted a presumption of a service connection for a specific group of veterans. The following sections describe the VA’s presumptive compensation programs for (1) atomic veterans, (2) Vietnam veterans, and (3) veterans of the Persian Gulf War.⁸¹ All VA cash payments are financed through federal appropriations.

Atomic Veterans: Non-presumptive claims

In 1984, Congress enacted legislation (P.L. 98-542) to establish a program to provide disability compensation to the so-called atomic veterans (i.e., radiation-exposed veterans who participated in the U.S. atmospheric atomic tests or in the U.S. occupation of Hiroshima and Nagasaki, Japan). The law instructed the VA to write regulations setting out the criteria for adjudicating claims. Under the program, the VA awards compensation if it determines that a veteran’s disability is “at least as likely as not” the result of exposure to radiation while in service.⁸² Although P.L. 98-542 only mentioned the atomic test participants and the occupation forces in Japan, the regulations cover all veterans who were exposed to radiation from any source while on active duty.

Each claim must be accompanied by an estimate of the radiation dose received by the claimant. Dose estimates are provided by the Defense Threat Reduction Agency (DTRA) using a variety of sources of data, including radiation badges worn by service personnel. Because many individuals were not issued badges and historical records are incomplete, inaccurate, or missing, DTRA often has to perform a dose reconstruction. A veteran may also submit an alternative dose estimate from a credible source. VA officials determine whether it is at least as likely as not that the veteran’s disease is the result of service-connected radiation exposure using a set of radioepidemiologic tables developed by the National Cancer Institute. These tables allow an investigator to look up the probability that the development of a particular cancer at age T was caused by a radiation dose, D, at age t. In order to satisfy the VA’s criterion (i.e., “at least as likely as not”), the probability of causation (POC) must be at least 50%. Current VA regulations state that all cancers and four non-malignant conditions (e.g., thyroid nodules) are potentially radiogenic. The agency will also consider evidence that diseases other than those listed in the regulations may be caused by radiation exposure.

⁷⁹ 38 U.S.C. § 501(a).

⁸⁰ Department of Veterans Affairs, “Presumption of Service Connection for Amyotrophic Lateral Sclerosis,” 73 *Federal Register* 54691-54693, September 23, 2008.

⁸¹ As defined in 38 U.S.C. § 101(33), the term “Persian Gulf War” means “the period beginning on August 2, 1990, and ending on the date thereafter prescribed by Presidential proclamation or by law.” As of now, this includes veterans from Operation Iraqi Freedom (OIF).

⁸² 38 C.F.R. § 3.311.

Atomic Veterans: Presumptive claims

In response to atomic veterans' complaints about the difficulty of getting compensation under P.L. 98-542, Congress in 1988 enacted the Radiation-Exposed Veterans' Compensation Act (P.L. 100-321), which established a presumption of a service connection for 13 specified types of cancer. Unlike the earlier law, P.L. 100-321 does not require an estimation of radiation dose. If a veteran participated in one of three specified radiation-risk activities⁸³ and has one of the listed cancers, that veteran is presumed to have a service-connected condition and is eligible for compensation.⁸⁴ P.L. 102-578 amended P.L. 100-321 by adding two more cancers to the presumptive list, and P.L. 106-117 added one additional cancer. In 2002, the VA announced the addition of five more cancers, bringing the total number of compensable cancers to 21.⁸⁵

Atomic veterans suffering from one of the 21 presumptive cancers have their claims adjudicated under P.L. 100-321. Veterans seeking radiation compensation for other types of cancer or non-cancer diseases must submit to a dose estimate or reconstruction and are considered under the non-presumptive program (i.e., P.L. 98-542).

Vietnam Veterans

In 1991, the Agent Orange Act (P.L. 102-4) established for Vietnam veterans a presumption of a service connection for diseases associated with exposure to Agent Orange and other herbicides that the U.S. Air Force sprayed over South Vietnam between 1962 and 1971. Under the act, veterans seeking disability compensation for diseases they claimed to be associated with herbicide exposure no longer were required to provide proof of such exposure. P.L. 102-4 authorized the VA to contract with the Institute of Medicine (IOM) to conduct, every two years, a scientific review of the evidence linking certain medical conditions to herbicide exposure. The VA was instructed to use the IOM's findings, and other evidence, to issue regulations establishing a presumption of a service connection for any disease for which there is scientific evidence of a positive association with herbicide exposure. Currently, the VA presumptively recognizes the following diseases as connected with military service in Vietnam: chronic lymphocytic leukemia; most soft-tissue sarcomas; non-Hodgkin's lymphoma; Hodgkin's disease; chloracne; multiple myeloma; type II diabetes; acute and subacute peripheral neuropathy; prostate cancer; respiratory cancers, and porphyria cutanea tarda. Additionally, Vietnam veterans' children with the birth defect spina bifida are eligible to receive a monthly monetary allowance in addition to certain health care services. The Veterans Benefits and Health Care Improvement Act of 2000 (P.L. 106-419) authorized similar benefits and services for children with certain birth defects who were born to female Vietnam veterans.⁸⁶

⁸³ P.L. 100-321 defined a radiation-risk activity as: on-site participation at an atmospheric atomic test; occupation of Hiroshima or Nagasaki; and internment as a POW in Japan during World War II, resulting in an opportunity for exposure. The VA subsequently expanded the definition of radiation-risk activities to include service at Amchitka Island, AK, prior to January 1, 1974, if a veteran was exposed while performing duties related to certain underground nuclear tests; and service at gaseous diffusion plants located in Paducah, KY, Portsmouth, OH, and an area known as K25 at Oak Ridge, TN.

⁸⁴ 38 C.F.R. § 3.309.

⁸⁵ The 21 cancers presumed to be service-connected for veterans who participated in radiation-risk activities are: leukemia (all forms except chronic lymphocytic leukemia); cancer of the thyroid, breast, pharynx, esophagus, stomach, small intestine, pancreas, bile ducts, gall bladder, salivary gland, urinary tract (renal pelvis, urethra, urinary bladder, and urethra), brain, bone, lung, colon, and ovary; bronchiolo-alveolar carcinoma; multiple myeloma; lymphomas (other than Hodgkin's disease); and primary liver cancer (except if cirrhosis or hepatitis B is indicated).

⁸⁶ See CRS Report RL34370, *Veterans Affairs: Health Care and Benefits for Veterans Exposed to Agent Orange*, by

Gulf War Veterans

In 1994, Congress created a presumption of a service connection for Gulf War veterans suffering from a difficult-to-diagnose or undiagnosed illness. The Persian Gulf War Veterans' Benefits Act (P.L. 103-446, Title I) provided authority to the VA to compensate Gulf War veterans with a chronic disability resulting from such an illness that became manifest during active duty in the Gulf War or within a specified presumptive period after Gulf War service.⁸⁷ The Veterans' Education and Benefits Expansion Act of 2001 (P.L. 107-103) expanded the definition of a qualifying chronic disability to include not just an undiagnosed illness, but also (1) a medically unexplained chronic multi-symptomatic illness such as chronic fatigue syndrome, fibromyalgia, and irritable bowel syndrome that is defined by a cluster of signs and symptoms, and (2) any diagnosed illness that the Secretary determines warrants a service connection.⁸⁸ As of July 2007, more than 3,300 Gulf War veterans had received service connection for their undiagnosed illnesses under this authority.

Selected Additional Federal Assistance Mechanisms

Federal Tort Claims Act⁸⁹

Background

The Federal Tort Claims Act (FTCA) allows suits against the United States for torts committed by federal employees. With exceptions, it makes the United States liable “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”⁹⁰

Program Administration

An injured person must first present an administrative claim to the responsible federal agency.⁹¹ If the agency denies the claim, the injured person may file suit in a federal district court,⁹² which will hear the case without a jury.⁹³

Sidath Viranga Panangala and Douglas Reid Weimer.

⁸⁷ 38 U.S.C. § 1117.

⁸⁸ 38 U.S.C. § 1117(a)(2). To date, the VA has not established a presumption of service connection for any diagnosed illness.

⁸⁹ This section was written by Henry Cohen, American Law Division.

⁹⁰ 28 U.S.C. § 1346(b).

⁹¹ 28 U.S.C. § 2675(a).

⁹² 28 U.S.C. § 1346(b).

⁹³ 28 U.S.C. § 2402.

Individual Eligibility

Any person may file a claim with the appropriate federal agency within two years after the claim accrues.⁹⁴ Federal employees injured on the job, however, whether military or civilian, may not recover under the FTCA.⁹⁵ Alternative compensation for work-related injury to these employees is available under the Federal Employees' Compensation Act and the veterans' compensation systems.

Eligibility or Participation of Health Care Providers

No restrictions.

Benefits

Successful plaintiffs may recover economic and noneconomic damages, to the extent allowed by applicable state law, except that punitive damages may not be awarded, and attorney's fees may not be awarded unless the United States acts in bad faith.⁹⁶ Awards must be in lump-sum payments, but the parties may agree to structured settlements (i.e., periodic payments).

Disease Presumptions

Not applicable.

Financing

Awards and settlements of \$2,500 or less are paid out of appropriations available to the agency whose employee committed the tort. Awards and settlements in excess of \$2,500 are paid out of general revenues.⁹⁷

Stafford Act Emergency and Disaster Assistance⁹⁸

Background

In response to catastrophes, the President can provide funding to both state and local governments, and to individuals, to assist them in response and recovery. Assistance is provided under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (the Stafford Act), upon a presidential declaration of an emergency (providing a lower level of assistance) or a major disaster (providing a higher level of assistance).⁹⁹ Pursuant to a Stafford Act emergency or major disaster declaration, federal assistance may be provided to assist individuals either in a congregate setting through state and local governments, or directly to

⁹⁴ 28 U.S.C. § 2401.

⁹⁵ 5 U.S.C. § 8116(c); *Feres v. United States*, 340 U.S. 135 (1950).

⁹⁶ 28 U.S.C. §§ 2674, 2412(b), 2412(d)(1)(A).

⁹⁷ 28 U.S.C. § 2672. Specifically, awards and settlements over \$2,500 are paid from the judgment fund, 31 U.S.C. § 1304, which is a permanent (i.e., not annually appropriated) fund for the payment of judgments not otherwise provided for.

⁹⁸ Assistance with this section was provided by Francis X. McCarthy, Government and Finance Division. See also, CRS Report RL33053, *Federal Stafford Act Disaster Assistance: Presidential Declarations, Eligible Activities, and Funding*, by Keith Bea; and "Federal Assistance for Disaster-Related Health Care Costs," in CRS Report RL33579, *The Public Health and Medical Response to Disasters: Federal Authority and Funding*, by Sarah A. Lister.

⁹⁹ 42 U.S.C. §§ 5121 *et seq.*

individuals, in covering the costs of health care for related injuries or illnesses. Additionally, if requested specifically by the Governor, a counseling program may also be made available under a Presidential declaration.

Program Administration

Stafford Act assistance programs are administered by the Federal Emergency Management Agency (FEMA) in the Department of Homeland Security (DHS).

Individual Eligibility

Individual eligibility is strictly based on residence in an area subject to a presidential emergency or major disaster declaration, pursuant to the Stafford Act.

Eligibility or Participation of Health Care Providers

No restrictions.

Benefits

Pursuant to section 408 of the Stafford Act, the FEMA Individuals and Households Program (IHP) provides cash assistance for uninsured, disaster-related medical, dental, and funeral expenses.¹⁰⁰ The amount available is the same for an individual or a household, and is capped in statute, with an annual adjustment based on the Consumer Price Index. The current ceiling (for FY2009) is \$30,300.¹⁰¹ Recipients might have to use the funds to meet other needs concurrently, such as rent and other costs of living. FEMA evaluates individual eligibility, and whether claimed medical, dental and funeral costs are disaster-related, on a case-by-case basis.

Section 416 of the Stafford Act authorizes the President, pursuant to a major disaster declaration, to provide financial assistance to state and qualified tribal mental health agencies for professional counseling services, or training of disaster workers, to relieve disaster victims' mental health problems caused or aggravated by the disaster or its aftermath. FEMA and the Substance Abuse and Mental Health Services Administration (SAMHSA, in HHS) jointly administer the Crisis Counseling Assistance and Training Program (CCP).¹⁰²

Pursuant to Stafford Act sections 403 (for a major disaster declaration) and 502 (for an emergency declaration), states may receive federal assistance in providing for victims' health care needs, but such assistance is not provided directly to individuals.

Disease Presumptions

Not applicable.

Financing

Activities undertaken under authority of the Stafford Act are funded through appropriations to the Disaster Relief Fund (DRF), administered by FEMA. The DRF is a no-year account in which appropriated funds remain available until expended. Supplemental appropriations legislation is

¹⁰⁰ 44 C.F.R. § 206.119.

¹⁰¹ 73 *Federal Register* 60310, October 10, 2008.

¹⁰² See CRS Report RL33738, *Gulf Coast Hurricanes: Addressing Survivors' Mental Health and Substance Abuse Treatment Needs*, by Ramya Sundararaman, Sarah A. Lister, and Erin D. Williams.

generally required each fiscal year to replenish the DRF to meet the urgent needs of particularly catastrophic disasters.

Breast and Cervical Cancer Treatment Program

Background

In 1990, Congress established, in CDC, the National Breast and Cervical Cancer Early Detection Program (NBCCEDP), which provides low-income, uninsured, and underserved women access to screening and diagnostic services to detect breast and cervical cancer at an early stage.¹⁰³ Women in the program who were found to have breast or cervical cancer often faced access barriers to treatment, for the same reasons that made them eligible for the screening program.¹⁰⁴ On October 2000, Congress passed the Breast and Cervical Cancer Prevention and Treatment Act of 2000 (P.L. 106-354). (In 2001, in the Native American Breast and Cervical Cancer Treatment Technical Amendment Act, P.L. 107-121, Congress amended the act to also apply to American Indians/Alaska Natives who are eligible for health services provided by the Indian Health Service or by a tribal organization.) The act gives states the option to provide medical assistance, through Medicaid, to eligible women who were screened through the NBCCEDP and found to have breast or cervical cancer, including pre-cancerous conditions. All 50 states and the District of Columbia now offer such coverage.

Program Administration

The Medicaid program is administered by the states under broad federal guidelines and the oversight of the Centers for Medicare and Medicaid Services (CMS) in HHS.¹⁰⁵

Individual Eligibility

In order for a woman to be eligible for Medicaid under this program, she must: (1) have been screened for and found to have breast or cervical cancer, including precancerous conditions, through the NBCCEDP; (2) be under age 65; and (3) be uninsured and otherwise not eligible for Medicaid. A woman remains eligible as long as she requires treatment for breast or cervical cancer, and continues to meet the other two criteria.

Eligibility or Participation of Health Care Providers

CMS develops Conditions of Participation (CoPs) and Conditions for Coverage (CfCs) that health care organizations must meet in order to receive reimbursement through the Medicaid program. These conditions are the minimum health and safety standards that providers and suppliers must meet in order to be Medicaid certified. (These conditions apply equally for Medicare.) There are no additional provider restrictions applied to the Breast and Cervical Cancer Treatment program.

¹⁰³ CDC, National Breast and Cervical Cancer Early Detection Program, <http://www.cdc.gov/cancer/nbccedp/>.

¹⁰⁴ In 2008, between 1% and 2% of women who were screened for each condition were found to have cancer.

¹⁰⁵ CMS, Breast and Cervical Cancer: Prevention and Treatment, http://www.cms.hhs.gov/MedicaidSpecialCovCond/02_BreastandCervicalCancer_PreventionandTreatment.asp.

Benefits

Eligible individuals are entitled to the full range of Medicaid services as specified in the state plan.¹⁰⁶ Benefits are not limited to services for breast or cervical cancer. As is the case with Medicaid coverage in general, states may use administrative mechanisms, such as prior review and approval requirements, to determine that care and services furnished to women in this program are medically necessary.

Disease Presumptions

Not applicable.

Financing

States and the federal government share the cost of Medicaid. States are reimbursed by the federal government for a portion of a state's Medicaid program costs. Because Medicaid is an open-ended entitlement, there is no upper limit or cap on the amount of federal funds a state may receive.¹⁰⁷ The federal share of Medicaid is funded through general revenues.

World Trade Center Medical Monitoring and Treatment Program

Background

Following the September 11, 2001, terrorist attack on the World Trade Center (WTC) in New York City (NYC), thousands of responders worked on the primary and associated sites in a rescue, recovery, and clean-up operation that lasted more than a year. In addition to the grim task of working amidst and recovering victims' remains, responders were potentially exposed to numerous toxins, including asbestos and other particulates, heavy metals, volatile organic compounds, and dioxin. Many of these workers are now experiencing physical and psychological health problems felt to be related to exposures at the site.¹⁰⁸

Following the attack, Congress provided appropriations to provide health care services for these workers, and others, in what is now called the World Trade Center Medical Monitoring and Treatment Program (MMTP).¹⁰⁹ The MMTP is not explicitly authorized, but has received discretionary appropriations to pay for health care services for eligible individuals. Some Members of Congress have sought to establish explicit authority for the program. The MMTP funds medical screening, monitoring, and treatment services for eligible workers (paid and volunteer) who were involved in the rescue, recovery, and clean-up activities following the attacks, and more limited services for some residents and others in the vicinity of the WTC during and after the attack.

¹⁰⁶ For more information, see CRS Report RL33202, *Medicaid: A Primer*, by Elicia J. Herz.

¹⁰⁷ *Ibid.*

¹⁰⁸ See HHS, "World Trade Center Health Resources," at <http://www.hhs.gov/wtc/>.

¹⁰⁹ The MMTP is one of a number of federal, state, and local programs that have funded or provided certain health care services to various groups affected by the WTC disaster. Information about some other programs may be found in GAO, *September 11: Problems Remain in Planning for and Providing Health Screening and Monitoring Services for Responders*, GAO-07-1253T, September 20, 2007, p. 7 ff, <http://www.gao.gov>.

Program Administration

The MMTP is administered by the CDC's National Institute for Occupational Safety and Health (NIOSH).¹¹⁰ NIOSH is responsible for program components that serve four distinct groups of people, namely (1) NYC firefighters; (2) other non-federal responders; (3) responders who were federal employees at the time; and (4) residents, students, and other non-responders affected by the disaster.¹¹¹

According to GAO as reported in May 2008, the program component for federal responders is implemented by Federal Occupational Health Services, under the HHS Assistant Secretary for Administration and Management, and was previously administered by the HHS Assistant Secretary for Preparedness and Response.¹¹² FOH provides screening services, but treatment capability may be limited. GAO has commented on difficulties that HHS has had in establishing and running this program component.¹¹³

Congress first established program eligibility for residents, students, and other non-responders in FY2008 appropriations. In April 2008, NIOSH reported to Congress that it was gathering information and exploring options for the provision of services for this "Community Program" in the NYC area.¹¹⁴

The MMTP is intended to serve responders and others who do not reside in the greater NYC area, although NIOSH has had difficulty assuring consistent access to services for these individuals.¹¹⁵ In May 2008, NIOSH awarded a contract to manage the WTC "National Responder Health Program."¹¹⁶ There is not, at this time, a comparable program for eligible non-responders outside the NYC area.

¹¹⁰ NIOSH, "World Trade Center Response," at <http://www.cdc.gov/niosh/topics/wtc/>.

¹¹¹ Earlier program literature may not include programs for federal responders and non-responders in discussions of the MMTP. For the purposes of this report, all four program components noted in the text are referred to as components of the MMTP. Federal assistance for health effects related to the World Trade Center disaster has also been provided through some additional mechanisms that are beyond the scope of this CRS Report. See, for example, Project COPE and the POPPA program, described in GAO, *Improvements Needed in Availability of Health Screening and Monitoring Services for Responders*, GAO-07-1228T, September 18, 2007, Table 1, p. 8; and the mental health program Project Liberty, GAO, *Federal Emergency Management Agency: Crisis Counseling Grants Awarded to the State of New York after the September 11 Terrorist Attacks*, GAO-05-514, May 31, 2005, <http://www.gao.gov>.

¹¹² For more information and a history of the program components, see GAO, *September 11: HHS Needs to Develop a Plan That Incorporates Lessons from the Responder Health Programs*, GAO-08-610, May 30, 2008, <http://www.gao.gov>, and earlier GAO reports in this series.

¹¹³ See, for example, GAO, *September 11: Problems Remain in Planning for and Providing Health Screening and Monitoring Services for Responders*, GAO-07-1253T, September 20, 2007, <http://www.gao.gov>.

¹¹⁴ National Institute for Occupational Safety and Health, *Providing Monitoring and Treatment Services for Those Experiencing Injuries or Illness as a Result of the World Trade Center Exposures*, Report to Congress, April 2008, (hereafter NIOSH 2008 Report to Congress), http://maloney.house.gov/documents/911recovery/20080506_WTCReporttoCongress_ProvidingMonitoringandTreatment.pdf. See, also, NIOSH "Non-Responder Health Program," <http://www.cdc.gov/niosh/topics/wtc/nonResponder.html>.

¹¹⁵ See, for example, U.S. Government Accountability Office, *September 11: Improvements Still Needed in Availability of Health Screening and Monitoring Services for Responders Outside the New York City Area*, GAO-08-429T, January 22, 2008; and *September 11: HHS Needs to Develop a Plan That Incorporates Lessons from the Responder Health Programs*, GAO-08-610, May 30, 2008, <http://www.gao.gov>.

¹¹⁶ See NIOSH, "National Responder Program," at <http://www.cdc.gov/niosh/topics/wtc/national.html>, and the solicitation notice at https://www.fbo.gov/index?s=opportunity&mode=form&id=5339b228f0a426cbef036145b7b392c7&tab=core&_cview=0.

A related program, the World Trade Center Health Registry, was established to track, through periodic surveys, the physical and mental health status of workers, residents, and others exposed to the WTC site, for up to 20 years.¹¹⁷ The registry, which is administered by the Agency for Toxic Substances and Disease Registry (under the CDC Director), does not provide compensation or health care services to registrants.

Individual Eligibility

Through appropriations, Congress has expanded eligibility several times since the MMTP began, most notably to include residents and other non-responders. (See the subsequent section on “Financing” for details.) At this time, the program covers WTC responders, whether paid (including contractors) or volunteer, regardless of their employer. The Fire Department of New York (FDNY) program is open to current and retired NYC firefighters, who are expected to receive care through the FDNY Bureau of Health Services and are, therefore, not eligible to receive care through the other program clinics. Beginning with FY2008 funds, the MMTP was to be expanded to include the Community Program, to provide monitoring and treatment for residents, students, and others affected by the WTC disaster. NIOSH has not yet published individual eligibility criteria for the Community Program.

NIOSH reported that as of December 31, 2007, 50,300 responders were registered in the MMTP, 47,000 of whom were in the NYC metropolitan area. Of those in the NYC metropolitan area, 9,744 had received treatment for respiratory and/or gastrointestinal conditions, and 5,674 had received treatment for mental health conditions.¹¹⁸ Publicly available program information does not describe the status of eligible non-federal responders with respect to collateral health insurance or worker’s compensation coverage.¹¹⁹

Eligibility or Participation of Health Care Providers¹²⁰

For federal and non-federal responders seeking services in the NYC area, the MMTP funds medical monitoring and treatment services, and associated administrative activities, through two grantees: (1) a network of occupational medicine clinics in the NYC area, often referred to as the “NY/NJ WTC Consortium” or the “Mount Sinai Coordinated Consortium,” and (2) the FDNY Bureau of Health Services. In May 2008, NIOSH awarded a contract to manage the WTC National Responder Health Program.¹²¹ Information about the provision of services through this program component has not been published. NIOSH reports that it has awarded a grant to the New York City Health and Hospitals Corporation to manage the Community Program.¹²²

¹¹⁷ NYC, “WTC Health Registry,” <http://www.nyc.gov/html/doh/html/wtc/index.html>.

¹¹⁸ NIOSH 2008 Report to Congress.

¹¹⁹ It is reported that some program participants lack either alternate funding source, and that for those who have both, administrative delays may nonetheless compromise health care delivery. See, for example, testimony of James Melius, Chair, Advisory Board of the MMTP, before the Senate Committee on Health, Education, Labor, and Pensions, hearing regarding “The Long-Term Health Impacts from September 11: A Review of Treatment, Diagnosis, and Monitoring Efforts,” March 21, 2007, 110th Cong., 1st Sess., Washington, DC.

¹²⁰ Unless otherwise noted, information in this section is drawn from NIOSH, “Responder Health Programs,” <http://www.cdc.gov/niosh/topics/wtc/responder.html>.

¹²¹ NIOSH, “National Responder Program,” <http://www.cdc.gov/niosh/topics/wtc/national.html>.

¹²² NIOSH, “Non-Responder Health Program,” <http://www.cdc.gov/niosh/topics/wtc/nonResponder.html>.

Benefits¹²³

Through appropriations, Congress has expanded program benefits for responders over the years. (See the subsequent section on “Financing” for details.) Initially, the program provided baseline screenings, then expanded to include regular medical monitoring. Finally, coverage for treatment was first established with FY2006 funds. At this time, for the diagnosis and treatment of specified conditions in eligible responders, the program covers all costs, without cost-sharing, including inpatient and outpatient medical procedures and prescribed medications. The program does not cover the costs of care for unrelated health conditions, or the costs of services provided by an individual’s personal physician if that physician is outside of the MMTP network. Also, for responders wishing to change the in-network clinic at which they receive care, the program generally permits only one such transfer. Services for family members of eligible responders are not covered, with the exception that certain family counseling services (such as marriage counseling) may be provided as part of an eligible responder’s treatment plan. The program does not recoup costs from other potential payers, such as health insurers or workers’ compensation programs.

The Community Program is more recent—established for the first time with FY2008 funds—and its treatment benefits are more limited. At this time, the Community Program “provides health screenings and assessments, health monitoring and tracking and improved access to health care services. The grant money is used to help cover gaps when individuals’ public or private insurance is insufficient to fully cover the costs associated with care or treatment.”¹²⁴

Disease Presumptions

At this time, disease presumptions have been provided for responders. Whether such presumptions will also apply to non-responders has not yet been published. For responders, covered conditions are those that are presumed to be related to WTC exposure or injury. They include “aerodigestive conditions” (e.g., asthma, chronic cough, and gastroesophageal reflux disorder); psychological conditions (e.g., post-traumatic stress disorder, depression, anxiety disorders, and substance abuse); and musculoskeletal disorders (e.g., low back pain, and “other musculoskeletal disorders”).¹²⁵ Per NIOSH:

The conditions covered by this program have been established through the following guidelines: 1) conditions that have been reported in large numbers of patients seen through the [MMTP], 2) rare conditions that have been diagnosed in some WTC responders and for which there is adequate scientific basis for a relation to the WTC-related exposures; 3) conditions which are anticipated because of the nature of the WTC exposures but usually do not occur until several years after the exposure.¹²⁶

In June 2007, NIOSH reported that aerodigestive conditions were the most prevalent, affecting 19% of MMTP registrants.¹²⁷

¹²³ Information in this section regarding benefits for firefighters and other responders is derived from NIOSH, “World Trade Center Response, Frequently Asked Questions,” March 20, 2007, <http://www.cdc.gov/niosh/topics/wtc/>.

¹²⁴ NIOSH, “Non-Responder Health Program,” <http://www.cdc.gov/niosh/topics/wtc/nonResponder.html>.

¹²⁵ For a list of conditions, see CDC/NIOSH, “World Trade Center Response, Frequently Asked Questions,” March 20, 2007, at <http://www.cdc.gov/niosh/topics/wtc/>.

¹²⁶ *Ibid.* The document does not describe the administrative process used to develop the list of diseases.

¹²⁷ NIOSH, briefing on the MMTP for Representative Carolyn Maloney (hereafter NIOSH briefing), June 15, 2007, p. 33, http://maloney.house.gov/documents/911recovery/20070615_WTC_Medical_Monitoring_and_Treatment_Program.pdf.

Financing

The MMTP has been funded through intermittent appropriations and has evolved since 2002, initially providing baseline medical screenings, then regular medical monitoring, and, currently, periodic monitoring for all participants and medical treatment for those with WTC-related illnesses. With the exception of small amounts for federal program administration, appropriated funds are provided to grantees (i.e., the consortium clinics and the FDNY) to deliver screening, monitoring, and treatment services. Grantees have used additional funding sources to support their programs, including charitable donations and state and municipal funds.

For FY2002, Congress directed \$12 million in supplemental appropriations to the CDC to develop a baseline medical screening program for WTC responders.¹²⁸ For FY2003, Congress provided \$90 million to continue baseline screenings and to provide long-term medical monitoring of program participants.¹²⁹ For FY2006, Congress provided \$75 million for ongoing registry, screening, and monitoring activities, and stipulated for the first time that funds could also be used for treatment.¹³⁰ In May 2007, Congress provided an additional \$50 million in supplemental funding for FY2007, to remain available until expended.¹³¹ For FY2008, Congress provided a total appropriation of approximately \$108.1 million, providing in the law that funds shall be used "... to provide screening and treatment for first response emergency services personnel, residents, students, and others...."¹³² For FY2009, Congress provided \$70 million, noting that an additional \$112 million was available in carryover balances from prior year appropriated funds.¹³³

In 2007, both NIOSH and the City of New York estimated that the program's future needs would exceed recent federal funding levels, especially with the addition of medical treatment to the services provided.¹³⁴ Projecting from earlier program expenditures, NIOSH estimated the probable short-term total annual cost of the program at \$428 million, whereas the New York task force estimated that it could exceed \$392 million. (Neither estimate included the cost of managing health problems, such as cancers, that have not emerged among program participants at this time, but that some experts fear may emerge in the future.) Subsequently, NIOSH reported to Congress that it estimated annual treatment costs for responders for FY2008 and FY2009 at between \$55 million and \$80 million, and that it was in the process of determining cost estimates for the care of non-responders.¹³⁵ GAO has noted concerns with NIOSH's cost estimation process

¹²⁸ P.L. 107-117, 115 Stat. 2313. The amount was to be obligated from funds already appropriated in P.L. 107-38, the original \$40 billion appropriation to support the nation's response to the September 11, 2001, terrorist attacks.

¹²⁹ P.L. 108-7, 117 Stat. 517. At least \$25 million of this amount was to be used to provide screening and monitoring services to current and retired firefighters.

¹³⁰ P.L. 109-148, § 5011(b), 119 Stat. 2815. In July 2007, GAO reported that the CDC had provided \$51 million of that amount to MMTP grantees for inpatient and outpatient medical treatment services. See GAO WTC report.

¹³¹ P.L. 110-28, 121 Stat. 166, referring to activities carried out under section 5011(b) of P.L. 109-148.

¹³² P.L. 110-161. Of the \$109 million provided in the law, \$56.5 million was designated as emergency spending, and the balance, \$52.5 million, was subject to a 1.747% across-the-board rescission.

¹³³ P.L. 111-8.

¹³⁴ See cost estimate in NIOSH briefing, pages 30-34; and World Trade Center Health Panel, "Addressing the Health Impacts of 9-11: Report and Recommendations to Mayor Michael R. Bloomberg," February 13, 2007, http://www.nyc.gov/html/om/pdf/911_health_impacts_report.pdf.

¹³⁵ NIOSH 2008 Report to Congress.

for FY2007, and improvements in the process it used to estimate costs for FY2008 and FY2009.¹³⁶

Legislation (H.R. 847) introduced in the 111th Congress would provide statutory authority for the MMTP and designate its costs as mandatory spending. Bills introduced in the 110th Congress, in addition to providing statutory authority for the MMTP, also proposed alternative financing options for the program (often coincident with other program modifications), including (1) authorizing continued discretionary appropriations (H.R. 1414/S. 201); (2) designating annual program appropriations as emergency spending (H.R. 3543); (3) designating the costs of screening, monitoring and treatment services as mandatory spending (H.R. 6594); (4) designating these costs as mandatory spending, but with total amounts only as provided in advance in appropriations acts (H.R. 7174); and (5) establishing Medicare eligibility for specified program beneficiaries (H.R. 1247). None of these proposals was enacted in the 110th Congress.

Additional Note

Traditionally, NIOSH has been involved in conducting or funding research on occupational illnesses and injuries; conducting on-site inspections (called Health Hazard Evaluations) to determine the toxicity of materials used in workplaces; developing information and guidelines regarding workplace safety; and educating workers, employers, and others.¹³⁷ The Institute is not typically involved in administering or funding the delivery of health care services. Congress has called on the Secretary of HHS, together with the Director of NIOSH, to submit a comprehensive long-term plan for the MMTP.¹³⁸ GAO has noted that HHS does not have a comprehensive plan to address responder health concerns in future disasters, though such a plan would fall among the responsibilities of the HHS Assistant Secretary for Preparedness and Response.¹³⁹

¹³⁶ GAO, *September 11: Fiscal Year 2008 Cost Estimation Process for World Trade Center Health Programs*, GAO-08-537R, March 11, 2008, <http://www.gao.gov>.

¹³⁷ NIOSH, "NIOSH Origins and Mission," <http://www.cdc.gov/niosh/about.html>.

¹³⁸ See, most recently, H.Rept. 110-231, to accompany Departments of Labor, HHS, and Education appropriations for FY2008, p. 218-219, July 13, 2007.

¹³⁹ GAO, *September 11: HHS Needs to Develop a Plan That Incorporates Lessons from the Responder Health Programs*, GAO-08-610, May 30, 2008, <http://www.gao.gov>.

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